

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

SMITHFIELD FOODS, et al.,

Plaintiffs,

Case No. 13-CV-651-RTR

v.

UNITED STATES OF AMERICA,

Defendant.

**PLAINTIFFS' SUPPLEMENTAL REBUTTAL EXPERT REPORT OF
DANIEL G. O'KELLY**

NOW COME Plaintiffs, by and through their counsel, and submit their Supplemental Rebuttal Expert Report of Daniel G. O'Kelly, as follows:

INTRODUCTION

Attorney for Denenberg Tuffley, PLLC, Charles R. Tuffley, contacted the International Firearm Specialist Academy (IFSA) on April 5, 2013 to request that IFSA assist Denenberg Tuffley, PLLC in determining the practices and procedures used in 2007 by the manufacturers of ammunition and military ordnance to prevent the theft of ordnance, specifically flares by facility employees and to compare the standard of care exercised by manufacturers and suppliers of military grade ordnance to prevent employee theft, including security signals, etc. with procedures in place by retailers of commercial flares sold in retail stores and the United States Marines at 29 Palms.

In order to make this determination, Mr. O'Kelly of IFSA relied on his 34 years of experience with arms, ammunition and explosives and the security standards used to protect

them from theft by the US Marine Corps, Police Departments – both foreign and domestic, Federal Law Enforcement agencies and manufacturers both foreign and domestic, transcripts of depositions, reports written by other experts, notes personally taken during arms factory tours.

IFSA was compensated at a rate of \$180 per hour for these services. Daniel O'Kelly has provided expert testimony on such matters in US District Court, regularly and continually since 1990.

SUMMARY OF OPINIONS

1. The Standard of Care regarding the prevalence of employee theft from manufacturers and suppliers of military grade ordnance (including flares) is considerably higher than the security measures utilized by the manufacturers and suppliers of commercially available flares sold in retail stores.

2. The Standard of Care utilized by Security Signal, Inc. (SSI) is much higher than the Standard of Care exercised by the Marines at Twentynine Palms Marine Base.

3. In order for Marines to come as close as possible to the Standard of Care exercised at SSI, it is imperative that the Marines at Twentynine Palms conduct shakedowns when Marines leave the live training range, and before the Marines leave Camp Wilson to return to main-side.

BASIS FOR OPINION ONE

Having toured and done research at firearm and ammunition/ordnance factories across the U.S., and in several European countries and in Africa, I have found that theft of weapons and ammunition/ordnance is a great concern for manufacturers, not only due to the financial loss that results, but also due to the collateral damage that can result from the presence of these items outside of the intended arena of use, especially if used by the untrained and irresponsible. As a

Special Agent of ATF, which is the agency responsible for the regulation of the arms, ammunition and explosives industry, and during my tours of factories which manufacture defense material, I have noted that in an effort to prevent theft, the various factories employ multiple layers of security measures. Such measures include:

- Electronic pass cards which are needed to gain entry/exit to the factory and/or limited access areas within the plant. In some cases, the access cards also monitor the employees' movements within the building.
- Closed circuit cameras and monitors with recording devices, and with humans monitoring the activity within the given area.
- Restrictions are placed on the employees' ability to take personal items into the work-space.
- There is also only one point of ingress/egress for employees, which are manned by security personnel.
- In some instances, the manufactured products are equipped with Radio Frequency Identification (RFID) tags which monitor the location of the item.
- Products in various stages of manufacture are also commonly kept in compartmented trays, which make it obvious if an item is missing.
- Some machines will cease operation automatically if an item is missing from a compartmented tray.
- In those plants where the products are serialized, the serial number is issued and recorded by computer, and if not serialized, they are bar-coded and monitored by inventory at every stage of production.
- There are also considerations given to even the disposal of trash, in order to prevent the "discarding" of a product that can be later recovered from an outside dumpster.
- As a condition of employment, some installations require employees to submit to periodic polygraph examinations.
- As a condition of employment, some installations require employees to submit to background investigation and periodic re-investigation.
- During production, there may be either cameras monitoring the employees' activity, or Supervisors walking the production line in order to monitor it.
- Security Guards are also commonly used to monitor product and employees.

- Limited access by employees to a certain production area is also a method employed by companies to prevent loss.
- Bag checks upon exit are not uncommon. Whereas these are at least the policy and practice of some retail dealers, they are commonly the policy and practice of the manufacturers of dangerous ordnance and ammunition.

In a review of the search procedure used by the Marines, as described by Mr. Catlin in his deposition, I find that the Marine standards are at least as detailed and thorough in theory as what many retail stores selling commercially available flares employ. However comparing that which is done by the Marine Corps to the retail industry, as did Mr. Esposito in his report, is ridiculous. The retail industry does not sell the explosives, incendiary materials and destructive devices that are in use by the Marine Corps. If the retail industry sold hand grenades, mines, military flares, mortar shells and plastic explosives, they would certainly employ a higher standard of care concerning theft by their employees.

BASES FOR OPINIONS TWO AND THREE

The industry that must be used as a benchmark for comparison is that industry which manufactures the explosive and incendiary products used by the Marine Corps.

I have seen most or all of these practices in use in each of the munitions factories which I have toured in the U.S., such as Hornady, 3D Ammunition, Lake City Army Ammunition Depot, Starline Brass, Sierra Bullets, and Winchester-Olin, and in foreign ammunition factories such as: MFS (Hungary), Sellier & Bellot (Czech Republic), PMP and New Generation (South Africa) and Hirtenberger (Austria).

IFSA holds that it is possible to prevent the loss or theft of this material through the stringent use of, and adherence to, strict security measures, and a high Standard of Care.

It is recognized by manufacturers that their products have a high value, are easily concealed, are of high-risk considering the possibility of misuse, negligent use or criminal use,

and that they have a "high desire" factor, and are therefore likely to be stolen. I recognize and grant that theft by employees is widespread and common. However, the manufacturer of the M125 flare at issue has never experienced a loss or a theft, due to the stringent measures of care and security in use at their facility.

A. Consideration and summary specific to military aerial flares.

The M125A1 is a rocket propelled, fin stabilized, hand launched, nighttime/daytime signaling device. When fired vertically, the signal projects to an altitude of 700-800 feet and produces five illuminant "stars" that burn for six seconds (minimum). The M125A1 consists of a five star illuminant assembly, an explosive primer, an initiating charge and a rocket motor propulsion assembly. It is manufactured solely for the military for use in hostile environments and is not available to the public.

B. The Standard of Care employed by Security Signal, Inc. (SSI)

The Standard of Care actually being carried out by SSI is, and has for decades, been commensurate with those that I have observed in other ordinance/munition manufacturing plants, and is a great deal more stringent than that which was being carried out by the Marine Corps in 2007. From beginning to end, even in testing, at SSI there is 100% accountability of the flares. They have no need to search employees because of this 100% accountability during manufacture. There is no occasion where even a single flare can be removed from inventory.

A review of the deposition of Susan Lee, President of SSI, the company which manufactures the M125A1 flare for the Marine Corps, states that her company has in place and uses without fail, a Standard Operating Procedure (SOP) for physical security, an offset plan, a key control roster, a key custodian, an Operational Security (Op Sec) plan and an SOP for their high-security building. They are subject to an annual inspection by the DSS (US Government

agency). Ms. Lee states, and I find it to be true, that there is 100% accountability at SSI, with Supervisors walking the production line. There is no way that a flare can be removed from the production line, due to the use of fitted trays and the fact that the machinery will stop functioning if one is removed. When a flare is completed, it is leak tested and placed into a 24 count can which is sealed. Once the pallet of full cans is placed into the secure building the movement of the pallet is logged.

None of their products are sold to the public. They have been in business since the mid 1950's, and the company has been owned by the same family for over 3 generations. It has 90 employees. It also has 2 licenses issued by ATF (US Government agency charged with regulating the explosives/ammunition industry). They are inspected by OSHA and TOSHA, and occasionally by Homeland Security.

SSI has a single person responsible for overseeing all operations, security and licenses. Security measures are in place and are observed and practiced concerning every phase of the operation. Employees are direct hires, and are all drug tested and background checked with random drug checks and annual security renewals. The company has never had an explosives accident. Samples of their product are not and have never been allowed out of the plant. In addition to annual inspections by DSS who report any violations directly to ATF, they have a DCMA officer who does safety audits quarterly. They have performed a mock accident training session for Homeland Security, including helicopter flights.

SSI has manufactured 4 million flares. They test-fire each lot of flares before they leave the plant, with the tests being carried out by a 5 man group including the DCMA representative. The DCMA rep is present for both the requisition and testing of flares, and verifies the number of flares present.

After testing, all spent ordnance is picked up off the range, and an end count is done. The company has never scrapped a "lot" of flares. All of their flares are 1.3 G hazard class, and they manufacture no 1.4G commercial-grade flares.

During production, they limit the number of people in a given building at a time for safety and security reasons. They employ the use fitted trays, which would make a missing flare obvious, and which would cause the dispensing system to stop working. After which each can of flares is filled it is sealed. Each pallet of full cans is strapped, and then placed into secure inner storage which is equipped with an ATF lock. The company president describes the ATF lock as "unbelievably hard to open", and that it would "be easier cut through the side of the building than to cut through the lock". The keys must be checked out in writing. The check out and return of a key is logged. Only certain people are authorized to check out a key. (Less than 10 percent of employees) The key to the ATF lock cannot be copied, and the copy would only be available through a Government agency. Ms. Lee stated under oath that she doesn't even know from which agency to even obtain one. There are a small limited number of people allowed to transport the product between buildings. The company maintains a log of everything that goes in and out of the magazine, and keeps an ongoing tally that is checked against the physical inventory daily.

There are 30 buildings throughout the plant, in order to decrease the access to individuals. There is more than one layer of supervision during production, and the plant has 2 rotating people who walk the assembly line at all times (a quality inspector and a supervisor) overseeing production, as well as occasional engineers and others who may be involved in the manufacturing process.

Only approximately 20 people have access to the flares once they are loaded, and there is never an occasion where a single employee is in that building alone. They have numerous employees with longevity of up to 40 plus years with the company, having continually had their integrity proven. Every day at 4:30pm the President or Plant Manager checks the key safe to ensure that all keys have been returned, and to lock the safe. The plant is gated, and access is restricted, requiring each person to be buzzed in. Cameras are at both entrances, and they are monitored by people who know all employees. They have had requests from former US Government Agents asking to visit the plant. SSI has denied these requests, and has reported the requests to the ATF and FBI.

SSI keeps up to 30,000 lbs. of explosives in their magazines at any given time. Every day, executive personnel check the key logs and the key safe, and weekly they inspect the magazine and locks for intrusion or tampering, and keep a log of those inspections. SSI does an audit of keys and locks 2 times per year. There is also an emergency call list for after hours and an Op Sec security plan in place which is required by contract and enforced.

The company employs full time security personnel during non-production hours. The security personnel undergo background checks which are submitted to ATF. The company also states that they limit the number of security guards allowed into the plant because they "want them to be familiar with the facility". They also give the security guards site-specific training in addition to that which the security company teaches them. Employees are required to keep their personal belongings in an area separate from the production line. Ladies are not even allowed to have their purses at the work station.

The plant has done personal searches of employees when necessary. The plant has never had an incident of missing ordnance nor missing explosives. Ms. Lee stated that SSI doesn't

operate on the premise of trusting employees to return unspent ordnance, because they don't "give them (ordnance) out to employees".

C. The standard of care in use at 29 Palms Marine Base

Marines employ the "shakedown" searches as an attempt to meet the level of accounting that is required, however the standards at SSI are much higher than those used by the Marines.

For the Marines, there is an inventory taken of the issued ordnance/ammunition. After training is completed, a search of the area is done, and then they are to do a "shakedown" search of the Marines. Later, another search is to be performed before leaving Camp Wilson.

Due to the simulation of battle conditions occurring out in the open rather than a confined building, the mass stress and confusion that results during the operation as a result of battle conditions, and the thousands of rounds of ordnance expended by the hundreds of Marines involved, it is not possible to watch every round expended by everyone. In order for the Marines to come as close as they can to the Standard of Care used by SSI, they must carry out the shakedown searches. It is the only thing that they can do. Due to the different environments in which the ordnance is used compared to SSI, the Marines must make sure that the measures in place (shakedowns) actually take place.

PRIOR EXPERT TESTIMONY

Prior to November 13, 2011, during my 23-year career as an ATF Special Agent, I provided testimony in numerous court cases involving ATF investigations, and was continually qualified as an expert witness in U.S. District Court beginning in 1990. As I am now retired, I do not have access to the list of cases in which I provided testimony. During the last 2.5 years since retirement, I have testified or provided expert opinions in:

U.S. vs. Coutnee Brantley (August 2012) U.S. District Court, Middle District of Florida

Fla. vs. Malik Williams, 13CF003404A (12/4/13)

U.S. vs. Theodore Hammond, E District of Virginia (3/14)

Fla. vs. Helen Hope Johns, 13-547-CF-O (JRS) (5/14)

Jacqueline Rosenbloom vs. David Morgan, et al., 3:13-CV-00160-RS-CJK (April, 2014,
U.S. District Court, Northern District of Florida)

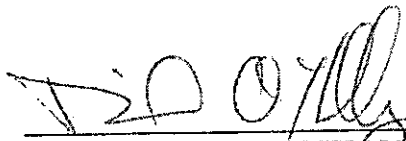
THE FACTS AND MATERIALS RELIED UPON IN FORMING OPINIONS

There are no applicable written standards or guidelines that I relied upon.

The material on which I relied in the formation of these opinions are my experiences in having toured and done research at firearm and ammunition/ordnance factories and dealerships across the U.S. and in several European countries and in Africa. As a Special Agent of ATF for 23 years, and during employment for 2 years as a corporate Firearm Compliance Manager for the world's largest retailer of firearms, Cabela's, I have noted the procedures which are in place, in an effort to prevent theft, and the multiple layers of security which various factories and stores employ.

Further, I relied on a review of the deposition of Susan Lee, President of SSI.

Dated: September 26, 2014



DANIEL G. O'KELLY

CURRICULUM VITAE

My experience in the field of high-risk/dangerous/regulated firearms, ammunition and explosives.

I was employed with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) as a Special Agent for over 23 years, with a prior 10.5 years as a full-time Police Officer. I served as a Patrolman, Field-training Officer, firearm instructor, range-master, armorer, National Academy staff member, undercover agent and Detective. In addition to my firearm expertise, I have extensive experience investigating arsons, suspicious fires, bombings and explosives incidents. Some of these investigations have gained National attention and have resulted in Special Service Awards being presented to me by ATF.

I also have considerable management experience, having served as the General Manager for Parker Oil Company, having managed the ATF undercover program at its National Academy, having been the Supervisory Special Agent for the State of Delaware, for which I received a Special Service Award, and by having privately-owned a State of Florida-licensed, property management company since 2003.

I served in the field, as a Senior Special Agent and an in-service instructor, where I have presented seminars on all aspects of firearms and ammunition and explosives to thousands of law enforcement personnel. Daniel is a firearm-range instructor, certified with ATF, Federal Law Enforcement Training Center (FLETC), Indiana Law Enforcement Academy (ILEA), National Rifle Association (NRA) and holds various certifications in impact weapons training, scenario training and simulator training. I maintain a large collection of firearm reference books and other material, am a collector of ammunition and firearms, a builder of firearms, and a hand-loader of ammunition. I have an extensive background as an Armorer, with certifications from 13 firearm companies, and hold a Bachelor's degree from Indiana University. I have been recognized by the Federal Court as an expert on the topic of firearms since 1990 and regularly attend the firearm industry trade shows, maintaining contact with manufacturing company representatives. I also served as the lead Firearm Technology Instructor at the ATF National Academy, while on staff there for 5.5 years, and co-wrote the curriculum taught to new Agents and Investigators.

I have taught seminars at/for the following law enforcement agencies, associations and organizations:

- Federal Law Enforcement Training Center (FLETC)
- International Law Enforcement Academy (ILEA) - Gabarone, Botswana (Africa)
- International Law Enforcement Academy (ILEA) – Budapest, Hungary
- ATF National Academy
- Indiana Law Enforcement Academy
- Florida Intelligence Unit
- United States Coast Guard
- United States Air Force
- United States Attorney's Office
- Florida Department of Law Enforcement

- Hillsborough Community College
- Valencia Community College
- New College of Florida
- Sarasota County Technical Institute
- Transportation Safety Administration (TSA)
- International Association of Law Enforcement Firearm Instructors (IALEFI)
- Florida Division of the International Association for Identification (FDIAI)
- Property and Evidence Association of Florida (PEAF)
- Numerous County Sheriff Departments and large city Police Departments

INSTRUCTOR CERTIFICATIONS:

- Indiana Law Enforcement Academy Firearm Instructor
- Federal Law Enforcement Academy Firearm Instructor
- NRA Law Enforcement Firearm Instructor
- FireArms Training Simulator (FATS) (Train the Trainer Course)
- Simunitions Scenario-Based Training (Train the Trainer Course)
- Pressure Point Control Technique (PPCT) Instructor
- Aeko International Chemical Weapons Instructor
- Youth Crime-Gun Interdiction Initiative (YCGII) Instructor

SPECIALIZED TRAINING CERTIFICATIONS:

- Basic ATF Firearm Nexus School
- Advanced ATF Firearm Nexus School
- Advanced ATF Ammunition Nexus School
- Advanced ATF (European) Firearm Nexus School
- Independent research at U.S. firearm factories/reference collections: Ruger, Pine Tree Castings, Springfield Armory, Colt, Mossberg, U.S Military Academy, Smith & Wesson, Knight's Armament, Diamondback, The Smithsonian Institute, Kel-Tec CNC, Patriot Ordnance Factory, Windham Weaponry, Arms Tech Ltd., STI and North American Arms.
- Independent research at foreign firearm factories/reference collections: Fegarmy and HPL (Hungary), Fabrique Nationale and Liege Proof House (Belgium), Vektor (South Africa), SIG Sauer, Heckler & Koch, Walther, BWB, BKA, Ulm and Kiel Proof Houses (Germany), Glock, Steyr, HGM and AWR (Austria), Holland & Holland and the Ministry Of Defense Pattern Room (England), CZ and Proof House (Czech Republic).
- Independent research at U.S. ammunition factories: Hornady, 3D ammunition, Lake City Army Ammunition Depot, Starline Brass, Sierra Bullets, Winchester-Olin.
- Independent research at foreign ammunition factories: MFS (Hungary), Sellier & Bellot (Czech), PMP and New Generation (South Africa), Hirtenberger (Austria).
- Top Secret U.S. Government clearance September 1988-November 2011.

ARMORER CERTIFICATIONS:

- Beretta
- Colt
- Smith & Wesson (pistol and revolver)
- Remington
- Fabrique Nationale
- Ruger
- DS Arms
- Springfield Armory
- Glock
- SIG Sauer
- Heckler & Koch

PROFESSIONAL ASSOCIATION MEMBERSHIPS:

- National Defense Industrial Association (NDIA)
- International Ammunition Association (IAI)
- ATF Ammunition Research and Identification Network (ARIN)
- National Rifle Association (NRA) Benefactor Member
- National Shooting Sports Foundation (NSSF)

MANAGEMENT EXPERIENCE:

March-June, 2000 – ATF Resident Agent in Charge for the State of Delaware. Received Special Act Award from Bureau Headquarters for bringing a problem-ridden office to within Bureau standards.

2003 – Present – President/Owner of Latitude Property Management, LLC

A State of Florida and City of Tampa licensed, property-management company, managing rental homes in Tampa, Florida. This management includes the advertising, applicant interview and screenings, problem-solving, maintenance and rent collection.

November 2011- Present – Director, International Firearm Specialist Academy

A State of Florida licensed training and consulting company.

CERTIFICATION

I hereby certify that on September 29, 2014, a copy of the foregoing Supplemental Rebuttal Expert Report of Daniel G. O'Kelly was filed and served electronically using the CM/ECF system.

Respectfully submitted,

By: /s/ Alyssa J. Endelman

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